

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Applications of AT&amp;T Inc. and Deutsche Telekom AG</b>	)	<b>WT Docket No. 11-65</b>
	)	
	)	
<b>For Consent To Assign Or Transfer Control Of Licenses and Authorizations</b>	)	
	)	

**RESPONSE OF IDT DOMESTIC TELECOM INC. TO THE JOINT OPPOSITION  
OF AT&T INC., DEUTCHE TELEKOM AG, AND T-MOBILE USA, INC.**

IDT Domestic Telecom Inc. ("IDT") agrees with the Joint Applicants' contention that the role of the Federal Communications Commission ("Commission") as it reviews the proposed transaction is to protect competition and not competitors.<sup>1</sup> However, the Joint Response of AT&T, Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. ("Joint Applicants") reinforces and highlights the merger-specific harm that will result *to competition* if this transaction is approved. That harm is inevitable with respect to the market for resold wireless services using the internationally accepted GSM operating standard. If approved, this transaction will bring the only provider of meaningful resold services under the control of a single firm with a proven antipathy toward wireless resale. In this case, the math is simple, two (one actual and one potential "hypothetical" competitor) minus one equals the elimination of competition.

The Joint Applicants advocate through a "Janus mask." One side praises and promotes MVNOs for the vibrant competition that they will bring to bear, while the other justifies the

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<sup>1</sup> Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. To Petitions To Deny and Reply To Comments ("Joint Response" or "Response"), at pgs. 98-99.

transaction on the need to withdraw from the market the crucial input that TúYo and other MVNOs rely upon -- access to spectrum compatible with the GSM operating standard. The Joint Applicants cannot have it both ways. The Commission should not rely upon the promise of competitive pressures from MVNOs while the Joint Applicants pursue a path that eliminates GSM-based MVNOs from the market.

#### **I. GSM-BASED MVNOs OFFER IMPORTANT PUBLIC BENEFITS**

As detailed in its initial submission, IDT entered into a Wholesale Supply Agreement with T-Mobile in February 2005 to launch TúYo Mobile. (IDT Domestic Telecom, Inc. and TúYo Mobile are collectively referred to as “TúYo”). TúYo was designed to serve the nation’s low-income and Hispanic communities.<sup>2</sup> TúYo delivers nationwide cellular services with an authentic Hispanic value proposition. TúYo’s tailored wireless solution provides: (i) competitively-priced rates, within the U.S. and to Latin America; (ii) culturally-relevant content customized for 16 Latin American markets; (iii) a unique set of calling features; (iv) diversified distribution network; and (v) a grassroots marketing approach to those consumers.

TúYo’s business efforts were immediately undercut by anti-competitive actions by T-Mobile. For example, in March 2006, as TúYo ramped up its marketing efforts, T-Mobile sent an email to various wireless dealers and sub-dealers threatening them with a loss of their ability to sell T-Mobile products if they sold TúYo. One email warned:

We would like to inform you that as of now Dealers have 2 choices when it comes to Selling TúYo (IDT) PrePay Reseller or any T-Mobile Reseller.

If the Dealer decides to sell any T-Mobile reseller products we will have no choice than to pull our product off shelves and shut off the dealer codes.

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<sup>2</sup> Since TúYo provides prepaid services, it does not perform credit checks. This allows low-income users to access competitively priced wireless services on an affordable basis. This is important to those customers who may not have access to bank accounts, credit cards or other advanced financial products.

Or the Dealer can continue to sell TMO and not one of the TMO resellers and will not be in danger of losing their Dealer Code.<sup>3</sup>

Although TúYo complained that the threats were working and that dealers and sub-dealers were dropping its services, T-Mobile refused to withdraw its anti-competitive communications. Even after its efforts undermined TúYo's sales efforts, T-Mobile filed a lawsuit against IDT alleging that it breached its wholesale service agreement by failing to purchase a minimum volume of service.

T-Mobile's harassment of TúYo is relevant because it demonstrates that T-Mobile takes seriously the actual and potential competition offered by MVNOs. While one part of T-Mobile offers a wholesale platform for GSM-based MVNOs, another takes extraordinary actions to prevent those same customers, GSM-based MVNOs, from succeeding in the retail CMRS market.

The Joint Applicants chose to simply ignore the important role played by GSM-based MVNOs in their Joint Response. Instead, they pretend that such MVNOs do not exist, and make the unsupported statement that "... T-Mobile is not a significant source of wholesale competition and its departure from the market will not have significant impact."<sup>4</sup> The truth is that TúYo and other GSM-based MVNOs such as TracFone are an important source of retail competition that will be derailed by the proposed merger. T-Mobile's departure will have a significant impact on the market and will impair or eliminate the competition that the Joint Applicants argue will keep their operations in check.

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<sup>3</sup> Answer of IDT Domestic Telecom, Inc. to Complaint and Counterclaims Against T-Mobile USA, Inc. ¶ 13, Case No. 09-2-1947-1 SEA, Superior Court of the State of Washington in and for the County of King.

<sup>4</sup> Joint Response, at pg. 212.



## II. THE ELIMINATION OF COMPETITION FROM MVNOs IS LIKELY TO INCREASE THE MARKET POWER OF THE JOINT APPLICANTS

The Commission's standard for evaluating market power is clear: if the transaction creates or enhances market power or facilitates its use, than it is unlikely to serve the public interest.<sup>5</sup> Similarly, the Horizontal Merger Guidelines developed by the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") provide that a merger "should not be permitted to create, enhance or entrench market power or to facilitate its exercise."<sup>6</sup> The DOJ and FTC determined that a merger enhances market power "if it is likely to encourage one or more firms to raise prices, *reduce output*, diminish innovation or otherwise harm customers as a result of *diminished competitive constraints or incentives*."<sup>7</sup> (emphasis added). TúYo's initial submission explained the incentives that the Joint Applicants have and how they can eliminate competition provided by GSM-based MVNOs. The Joint Applicants did nothing to rebut that contention.

The pleadings of the Joint Applicants make clear that they will repurpose spectrum used by T-Mobile to offer wholesale service to MVNOs to alleviate spectral capacity constraints that allegedly plague AT&T. The Joint Applicants failed to address whether the merged entity would continue to provide wholesale services to MVNOs on commercially reasonable terms, and

<sup>5</sup> See, e.g., *In the Matter of Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless For Consent To Assign Or Transfer Control Of Licenses And Authorizations And Modify A Spectrum Leasing Arrangement*, Memorandum Opinion and Order, WT Docket No. 09-194, FCC 10-116, at ¶31 (rel. June 22, 2010) ("AT&T/Verizon Order"); *In the Matter of the Applications of AT&T Inc. and Dobson Communications Corporation For Consent To Transfer Control Of Licenses And Authorizations*, Memorandum Opinion and Order, WT Docket No. 07-153, FCC 07-196, at ¶15 (rel. Nov. 15, 2007); *In the Matter Of The Applications Of AT&T Wireless, Inc. And Cingular Wireless For Consent To Transfer Control Of Licenses And Authorizations*, Memorandum Opinion And Order, WT Docket No. 04-70, FCC 04-255, at ¶68 (rel. Oct. 26, 2004).

<sup>6</sup> Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission, issued on Aug. 19, 2010, located at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>, at pg. 2;

<sup>7</sup> *Id.*



whether or not it would desist from using its market power in an anti-competitive manner. That silence exposes their view that GSM-based MVNOs are a nuisance that the merged entity would prefer to be rid of – and that AT&T is likely to cause T-Mobile to discontinue its wholesale service offerings. The disappearance of GSM-based MVNOs will increase the market power of the merged entity significantly in the product market for GSM-based CMRS services.

### **III. GSM PROVIDERS CANNOT EASILY MIGRATE THEIR CUSTOMERS TO OTHER PLATFORMS**

The Joint Applicants again pull out their Janus mask to blithely dismiss concerns about the withdrawal of a specific technological platform by stating that GSM-based MVNOs can migrate their customers to other technology standards. AT&T declarant Carlton contends that resellers and MVNOs often purchase from both CDMA- and GSM-based carriers and will have that ability after the proposed merger.<sup>8</sup> That is not the case with TúYo or other GSM-based MVNOs who will lack any other competitive alternative compatible with their GSM spectrum.

Yet while making that argument, AT&T and T-Mobile bemoan their own difficulties in migrating customers. As AT&T explains, “[t]he ability of a carrier to respond to increases in demand is limited due in part to the limited capability of existing handsets in new technologies.”<sup>9</sup> AT&T concedes that with respect to its own subscribers, it does not market 2G handsets and limits their availability to its prepaid customers in large part due to network capacity issues.<sup>10</sup> Since AT&T prohibits or severely limits its own end users access to 2G handsets and spectrum, it is not going to be open to expanding those services on a post-closing basis.

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<sup>8</sup> The Combined Declaration of Dennis W. Carlton, Allan Shampine, and Hal Sider, attached to the Application (June 9, 2011), attached to the Response, at ¶ 10.

<sup>9</sup> The Combined Declaration of Dennis W. Carlton, Allan Shampine, and Hal Sider, attached to the Application (April 20, 2011), attached to the Joint Applications’ Petition., at ¶ 33.

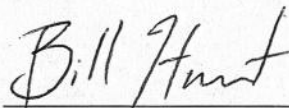
<sup>10</sup> Declaration of David A. Christopher (June 10, 2011), attached to the Response, at fn. 6.

The simple reality is that older GSM-only devices will not work on networks that have deployed UMTS/HSPA/HSPA+ standards. The Joint Applicants concede that for a carrier to migrate its customers to new handsets is a "multiyear" undertaking. The length of that transition and the expense incurred by such a shift puts MVNOs, with no competitive alternatives for GSM spectrum, at the whim and mercy of their hostile, sole provider – AT&T – which will be able to impose any new terms it desires, including price hikes, free of competitive pressures.

### CONCLUSION

In their Response to the petitions to deny, the Joint Applicants do not refute the anticompetitive harms shown by TúYo. Under any test, these anticompetitive actions will facilitate and increase market concentration, lead to the withdrawal of a crucial input required by GSM-based MVNOs, and harm the public interest. Absent significant conditions to prevent these harms, the Commission should reject the proposed transfer of control of T-Mobile USA to AT&T.

Respectfully submitted,



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